1953

E. N. Youngren v. Alice H. King : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

E. N. YOUNGREN,

Plaintiff and Respondent,

vs.

ALICE H. KING,

Defendant and Appellant.

Case No. 8033

BRIEF OF APPELLANT

JOSEPH C. FRATTO
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STATEMENT OF FACTS

On the 20th day of January, A. D. 1941, the appellant, Alice H. King, entered into an agreement designated a Uniform Real Estate Contract (Ex. A) with respondent, E. N. Youngren, whereby the former agreed to sell and the latter agreed to buy the real property therein described.

By the terms of the contract (Tr. 21, 22, and Ex. A) respondent agreed to pay appellant for the premises described

therein the sum of Two Thousand Eight Hundred and Fifty ($2850.00) Dollars as follows: Seven Hundred ($700.00) Dollars as down payment, Five Hundred ($500.00) Dollars on January 20, 1942, Five Hundred ($500.00) Dollars on January 20, 1943, Five Hundred ($500.00) Dollars on January 20, 1944, and Six Hundred and Fifty ($650.00) Dollars or so much thereof of the principal and interest as remained unpaid on January 20, 1945, together with interest at the rate of six per centum (6%) per annum, payable annually. Appellant agreed to deliver to respondent a good and sufficient warranty deed conveying the premises described in the contract upon receipt of payment in full of the principal and interest.

Respondent contends he has made payment in full in accordance to the terms of the contract plus $128.50 overpayment (Tr. 1, 21, 22), but that appellant has refused (Tr. 26) to deliver to him a warranty deed to the premises described in the contract.

Respondent avers he made the following payments to respondent (Tr. 21, 22, 26):

January 20, 1941	$700.00	(Ex. B)
January 14, 1952	$600.00	(Ex. C)
March 13, 1943	$985.00	(Ex. F)
March 16, 1944	$800.00	(Ex. D)
June 18, 1946	$200.00	(Ex. E)
Total Payments	$3285.00	

That of the total payments $306.50 (unnumbered exhibit) was for interest to and including the 18th day of June, 1946, making a total sum due to appellant of $3156.50 resulting

in an overpayment of $128.50, although in the complaint (Tr. 1) the overpayment alleged was $120.50. Except for the unnumbered exhibit which was never introduced in evidence, no effort was made in the course of the trial to determine how much respondent actually paid on the interest.

Appellant disputes receiving a payment of $985.00 on March 13, 1943, (Tr. 34) but claims she received a payment of $800.00 on March 16, 1943 (Tr. 35), and denies receiving any payment whatsoever in 1944 (Tr. 41), and admits (Tr. 15) receiving the down payment of $700.00 (Tr. 34), $600.00 on January 14, 1942 (Tr. 34), and $200.00 on June 18, 1946 (Tr. 34) for a total of $2300.00 which includes interest from the date of the contract (Ex. A) to January 20, 1952, leaving a balance due and owing on the principal and interest of $1392.50 (Tr. 5, Ex. 1).

Appellant concedes (Tr. 34) that she received a check (Ex. F) from respondent dated March 13, 1943, in the sum of $985.00, made by the Utah Farm Credit Association payable to the order of the respondent and endorsed by him to the appellant who insists that she returned to respondent the sum of $135.00 for which she received no receipt and applied $50.00 on back taxes, leaving a total of $800.00 to be applied on the contract, and maintains (Tr. 35) that she gave to respondent a receipt (Ex. D) for $800.00 dated March 16, 1944, for the $800.00 retained by her from the check (Ex. F), and explains the discrepancy in the date of the check and the date of the receipt as an error when she mistakenly wrote the numeral 4 after the 194..... on the receipt instead of the numeral 3 (Tr. 36) and first discovered her error (Tr. 35)

when appellant was given a list of alleged payments by respondent's counsel.

On January 17, 1952, appellant served notice (Ex. 1) on respondent demanding payment of the balance due on the contract or for respondent to deliver to her possession of the premises described in the contract.

The trial court, sitting without a jury, found the issues in favor of the respondent, and findings (Tr. 84, 85), conclusions (Tr. 85), and judgment (Tr. 86, 87) were prepared by respondent and signed by the trial court. From this judgment and the refusal of the trial court to grant a new trial (Tr. 91), the appellant appealed (Tr. 92).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT IMPROPERLY FOUND THAT RESPONDENT PAID THE APPELLANT IN FULL PURSUANT WITH THE TERMS OF THE CONTRACT.

POINT II

THE TRIAL COURT IMPROPERLY FOUND THAT RESPONDENT PAID THE APPELLANT THE SUM OF $800.00 ON MARCH 16, 1944 ON THE CONTRACT.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT A NEW TRIAL.

ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY FOUND THAT RESPONDENT PAID THE APPELLANT IN FULL PURSUANT WITH THE TERMS OF THE CONTRACT.

The law is well established in Utah that the Supreme Court has full power to review all questions of law and fact in equity cases, and unless the evidence is clearly sufficient to sustain the findings of the trial court, the judgment may be set aside or modified. See McKay vs. Farr, 15 U. 261, 49 P. 649, Klopenstine vs. Hays, 20 U. 45, 57 P. 712, and Sidney Stevens Implement Co. vs. South Ogden Land, Building & Improvement Co., 20 U. 26, 58 P. 843. Only questions of fact are involved in th instant case and the argument is directed to the facts only.

Respondent maintains he made a payment on the contract (Ex. A) to the appellant by a check (Ex. F) dated March 13, 1943, drawn by the Utah Farm Credit Association payable to respondent (Tr. 22). Appellant admits (Tr. 34) receiving a check in this amount, but says (Tr. 34) she gave back to respondent the sum of $135.00 and at respondent's request kept $50.00 for back taxes.

Whether appellant gave to respondent $135.00 in change for the check (Ex. F) is of vital importance. Respondent claims that he had paid the contract in full plus $128.50 overpayment. If he received back $135.00 from the check, by his own figures (Tr. 1, 21, 22, 23, 24, and unnumbered exhibit), he would still owe $6.50 on the principal plus

interest, without at this time taking into consideration the disputed payment of $800.00 allegedly made in 1944 (Tr. 22), and thereby the trial court improperly ruled that respondent has paid appellant in full and was entitled to a warranty deed for the premises described in the contract.

There is no evidence to support the finding of the trial court other than the unsupported testimony of the respondent which is conclusively rebutted by the facts elicited at the trial. Respondent evidently borrowed $985.00 as a loan on crops (Tr. 16) and was issued a check (Ex. F) by the lender for that amount. That he did not intend to pay the appellant the full face value of the check is clear for he testified (Tr. 27) that he expected to receive some money back from appellant, but at no time was it determined why he did no, except that he said (Tr. 27) "I was to have some of it back but I never got it back."

Appellant, on the contrary, emphatically said that respondent told her (Tr. 34) "I want to pay you $800.00 out of here . . . " Certainly respondent who expected to get some money back from the check must have told appellant how much he intended to give as payment on the contract. There can be no good and clear reason for disbelieving appellant on this testimony, but there is every reason to believe appellant did give back $135.00. It must be remembered that the full purchase price was not due in March 1943 for respondent was only in arrears on his payments the sum of $29.00 (Tr. 23) and $800.00 was more than was due. Had appellant refused to give back the money, the respondent would have asked for an explanation, and he certainly would have been

very angry, and would have remembered the transaction in great detail instead of treating the incident nonchalantly by merely saying (Tr. 27) "I was to have some of it back but I never got it back."

Other testimony by respondent indicates conclusively that respondent did receive the sum of $135.00 from the check. Appellant testified (Tr. 34) that respondent told her to keep $50.00 out of the check for back taxes and respondent admits (Tr. 24) that he told her to do so. If this portion of the conversation is to be believed, why should the part of the conversation which concerned the $135.00 be disbelieved?

We submit the whole conversation occurred as related by appellant. That respondent had intended to make a payment in the sum of $800.00 and was to receive back $185.00, but when the question of taxes was raised, he decided to pay them, and demanded the return of $135.00, and that he did receive $135.00 for at that time there were no reasons for appellant to demand more than was due, and one can hardly conceive that when appellant got the check in her hands, she refused to give back the change demanded without an explanation, and he certainly would have requested a receipt, but he neither asked for nor received a receipt for $985.00, and his reasons for not doing so is another factor which proves he did get the $135.00.

Respondent was asked (Tr. 25):

> Q. And at this time you gave her a check of someone else's for $985.00 and didn't take any receipt for the amount applied on the contract?

A. No. Because I told her the check—they hold it back.

Q. But you were not going to get the check back?

A. Yes, but I asked Mr. Winder's office if they would hold that check. I asked for that check as a receipt.

Q. When did you ask for it?
A. When I made application for my loan.

At the time respondent made application for the loan (Tr. 27) he did not intend to give all the money represented by the check to appellant for he testified (Tr. 25) "I was to have some of it back . . ." Since he intended to have some of it back, he could not have expected to keep the cancelled check as a receipt from appellant and did not tell the maker to hold the check before he knew the appellant would not return any of the money. A representative of the maker of the check was a witness at the trial (Tr. 15) but was not asked by respondent to testify on this point. Respondent admits (Tr. 22) that he had difficulty finding the check (Ex. F). Why the difficulty? Had he really asked that the check be held woudln't the maker have made some notation on the check? Would not the maker have had some knowledge of the request to hold and thereby could have testified?

Consider this. Respondent testified to an alleged conversation with appellant on March 16, 1944 (Tr. 22), whereby he claims he tried to make a payment of $800.00 but appellant said:

"Why do you give me all this money? Why don't you give me the interest and let the principal go?"

True, the alleged conversation transpired a year later, but it is informative. If the appellant in 1944 did not want to collect on the principal, it is inconceivable that in 1943 against the will of the respondent she would keep a larger payment than was due.

There can be no question appellant only received a payment of $800.00 in March, 1943. The trial court unquestionably erred on this phase of the dispute, and had no basis to disbelieve the appellant, and thereby should not have found that respondent was entitled to a warranty deed for at least $6.50 plus interest was still due on the contract.

POINT II

THE TRIAL COURT IMPROPERLY FOUND THAT RESPONDENT PAID THE APPELLANT THE SUM OF $800.00 ON MARCH 16, 1944 ON THE CONTRACT.

Appellant denies (Tr. 37) and respondent claims (Tr. 22) that in 1944 he made a payment to appellant in the sum of $800.00 and received a receipt (Tr. 22, Ex. D) for the payment dated March 16, 1944. Appellant admits giving the receipt (Tr. 36) but avers that it was for the $800.00 she kept from the check (Ex. F) in 1943, and explains the difference in dates as a mistake in dating the receipt 1944 instead of 1943 (Tr. 36).

An examination of Exhibit F discloses that the numerals 194 are printed and after the printed numerals a printed line

follows to allow space to add the numeral of the exact year thus 194..... It is not uncommon for a person without giving the matter a thought to write the same last numeral in the blank space which appears as the last printed numeral.

Aside from the natural mistake one can easily make when writing numerals, the facts concerning the alleged payment in 1944 are all in favor of the appellant. True the respondent has the receipt (Ex. F) and he testified to the payment (Tr. 22), but his own testimony is inconsistent and taxes the imagination.

Respondent claims the payment of $800.00 was made on March 16, 1944, the date appearing on the receipt (Tr. 22). He admitted by his reply (Tr. 8) to appellant's counterclaim (Tr. 5) that a payment was made on March 16, 1943, but denied the amount. The arm of coincidence would have to stretch far indeed to believe respondent made two consecutive payments on the same day of the month, a year apart, when the particular month and day was not the regular time to make a payment. No, respondent was only taking advantage of an honest mistake made by the appellant in writing the receipt.

According to appellant the payment was made with eight $100.00 bills (Tr. 22) which he said were received from the sale of hogs (Tr. 25) to an unknown hog buyer. Unfortunately, the exact day in March when the alleged sale was made was not elicited from the witness, but his convenient lack of memory concerning the identity of the hog buyer is suspicious. He did not even know how long he carried this large sum of money before he paid the appellant (Tr. 55). Obviously the respond-

ent tried to bolster his position when he tried to elicit from his sister (Tr. 78, 79) that in 1944 he gave her two $100.00 bills he had received from the unknown hog buyer, but she testified the money could have been given to her either in 1943 or 1944.

We have only the respondent's word that he sold the hogs, but the evidence is overwhelming that if he did, no payment was made to appellant from the proceeds of the sale. Whenever appellant received a payment from respondent in addition to giving him a receipt, she would make an entry immediately at the time she received the payment (Tr. 61, Ex. 2) in her personal account book. Appellant wrote down a payment in the sum of $800.00 received from respondent as of March 16, 1944, the same as on the receipt, but when she learned of her error many years later (Tr. 59) appellant corrected it by writing over the numer al 4 the numeral 3 in the last numeral 4 in 1944. Note that she did not erase or in any way try to conceal the change, but just wrote in the change. A person who wants to get money that he is not entitled to would not have made the change in this manner.

Significantly, also, an examination of Exhibit 2 discloses that appellant had made entries of all payments, except the alleged payment of $985.00, which entries included the payment of June 18, 1946. Why would she have left out a payment of $985.00? There can be only one reason—she did not ever receive a payment in this amount.

Appellant's position is further fortified by respondent's own testimony. He admits (Tr. 27) that when he borrowed the

$985.00, he had no intention of paying all of it to appellant, and, therefore, when he applied for the loan he could not have asked, as he contends, the lender (Tr. 25) to hold the cancelled check for a receipt. A representative of the lender was in court (Tr. 15), but he was not asked to bolster the unsupported word of the respondent. Why? Because he had never made the request that the check be held.

The appellant at various times (Tr. 39, 70) demanded payment from respondent, but he told her he did not have the money. She made an appointment with him for an accounting (Tr. 36, 70) which he never kept, and although she attempted for one whole week (Tr. 37) to see him, she was never able to do so. Did respondent act like a man who had paid his debt in full or did he act like a man who was avoiding the creditor? The facts speak for themselves.

Appellant at one time even went so far as to give him a list of payments when requested by him (Tr. 42, Ex. L, which is missing), which her brother (Tr. 43) prepared. The exhibit is not before the writer, and from the transcript, it is impossible to determine how the accounting was set up. However, it is clear (Tr. 43) that an eror was made in the accounting showing a payment which neither side claimed was ever actually made (Tr. 43), and the appellant, who is a housewife and not too well acquainted with business matters, was unable to explain the sums arrived at by her brother. However, lost Exhibit L did show a balance due and owing and the respondent did not make an issue of it at the time, but on the contrary, the accounting did not show a payment of $985.00 on March 16, 1943, or a payment in that sum on any other date. If

respondent had ever made a payment in that sum, would he not have pointed it out to the appellant at the time he received the accounting? There is absolutely nothing in the transcript to even hint that he raised the question. There must be a good reason why he did not do so and this reason is that he never had made a payment of $985.00. When taking into consideration that the accounting was made in 1949, his failure to point out the omission of the alleged $985.00 payment is more than significant, it is conclusive that respondent had never made a payment in that amount.

We submit, the only clear and substantial evidence on this matter of payment in 1944 is all in favor of the appellant and the trial court had no reasonable basis for holding that a payment had been made.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT A NEW TRIAL.

The appellant moved the trial court for a new trial (Tr. 89) upon the grounds of the insufficiency of the evidence to justify the decision and judgment, and that the decision and judgment were against the law. The arguments in Points I and II are herein incorporated in Point III as good grounds and reasons why the trial court should have granted a new trial without giving the arguments again in detail.

The motion for a new trial also included an allegation that the appellant had discovered new evidence which could

not with reasonable diligence have been discovered and produced at the trial. The portion of the motion for a new trial was supported by an affidavit (Tr. 83).

The affidavit (Tr. 83) set forth that the affiant was the sister of the appellant and that affiant's husband died on March 16, 1944, and that from the early hours of that day to a late hour of the night, appellant was not at her home but at the home of the affiant. The affidavit speaks for itself, and the trial court should have granted a new trial.

CONCLUSION

On the basis of the points discussed herein, appellant submits, the judgment of the trial court should be set aside and a new trial ordered.

Respectfully submitted,

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